United States Court of Appeals

for the Second Circuit

APPELLEE'S SUPPLEMENTAL BRIEF

76-6114
76-6119

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 76-6114
76-6119

B

CHIN LAU,

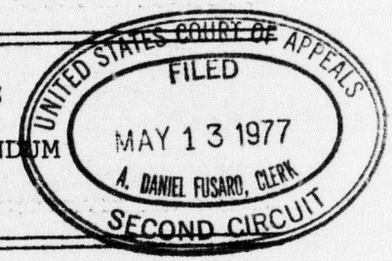
Plaintiff-Appellee-
Cross-Appellant,

P/S

- v. -

MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,

Defendant-Appellant-
Cross-Appellee.



PLAINTIFF-APPELLEE'S
SUPPLEMENTARY MEMORANDUM
ON JURISDICTION

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHIN LAU,	:	
	:	
Plaintiff-Appellee-Cross-Appellant	:	DOCKET NOS.
	:	76-6114
v.	:	76-6119
	:	
MAURICE F. KILEY, District Director of the New York District, Immigration and Naturalization Service, United States Department of Justice,	:	
	:	
Defendant-Appellant-Cross-Appellee	:	

PRELIMINARY STATEMENT

On oral argument on May 4, this Court directed both counsel to submit supplementary briefs on the question of whether the District Court's order (A.202) denying the defendant's motion for summary judgment and granting plaintiff's cross motion for summary judgment to the extent of remanding the case to the Board of Immigration Appeals for reconsideration of plaintiff's petition, in accordance with the District Court's opinion of March 25, 1976 (A. 187), was a decision of sufficient finality to give this Court jurisdiction to hear defendant's appeal.

28 U.S.C. Section 1291 grants the courts of appeal jurisdiction to hear appeals only from "final" decisions of the district courts. Broadly stated, a "final" decision is one which ends litigation on the merits and leaves nothing for the court to do but to execute the judgment. Catlin v. United States, 324 U.S. 229, 233. In the context of review by district courts of administrative agency decisions, the general rule has been stated to be that remand orders for further proceedings are interlocutory in nature and are not final judgments so as to be appealable under 28 U.S.C. Section 1291. Pauls v. Secretary of Air Force, 457 F. 2d 294, (C.A. 1 1972) and Barfield v. Weinberger, 485 F. 2d 696 (C.A. 5 1973).

The proper application of the rule of appealability, however, turns on a "practical rather than a technical construction". Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). Where the substantial impact of the district court order, if not reviewed, is the "death knell" of the action, an appeal should be allowed. Eisen v. Carlisle & Jacquelin, 370 F. 2d 119, 121 (C.A. 2 1966) cert. den., 386 U.S. 1035. See also: Nguyen Da Yen

v. Kissenger (C.A. 9), 528 F. 2d 1194, 1199, fn. 4. Moreover, in administrative hearings the non-appealability of a remand order to the administrative agency is subject to the further qualification that the remand order must have been made "without a review by the court of the administrative record nor a decision by it on the substantial evidence question" for it to be the type of interlocutory order which is not appealable. Cohen v. Perales, 412 F. 2d 44, at p. 48, (C.A. 5 1969), rehearing denied 416 F. 2d 1250, reversed on other grounds, 402 U.S. 389.

In the present case the District Court reviewed the entire administrative file and specifically reversed the decision of the Board of Immigration Appeals which held that the plaintiff had failed to establish paternity pursuant to the second paragraph of Article 15 of the Marriage Law of the People's Republic of China (A. 192, 193, 194). In reversing the Board the District Court held that the second paragraph of Article 15 retains a paternity suit which will be used, as in this country, only when the putative father denies the relationship and that the Board erred in finding such a

procedure was necessary to determine the "legitimacy" of a child born in China out of wedlock (A. 194). The Court then remanded the case to the Board and the Immigration Service to determine whether as a matter of fact, plaintiff and his son had a family relationship and stated that if it were so established there should be no reason why the preference petition should not be granted (A. 196, 197).

If defendant's appeal is now dismissed on the grounds of lack of finality, regardless of the results of the remand, the government will have lost its chance to defend the legal correctness of the Board's decision in this case which was based on its precedent decision in Matter of Lo, I.D. 2209, 14 I & N 379 (BIA 1973) which held that Article 15 of the Marriage Law of the People's Republic of China requires a paternity proceeding establishment as a condition precedent in order to determine the legitimacy of out of wedlock children. An appeal should be allowed when the effect of its denial would mean that the government would probably never be able to test the legal correctness of the District Court's finding. Gueory v. Hampton, 510 F. 2d

1222, 1225 (C.A. D.C. 1974); Ringsby Truck Lines v. United States, 490 F. 2d 620, 624 (C.A. 10 1973) cert. den. 419 U.S. 833. See also: Wells v. Southern Railways Inc., 517 F. 2d 132, 134, fn. 3, (C.A. 5 1975) rehearings denied 522 F. 2d 707 and 526 F. 2d 816.

In view of the foregoing reasons, and notwithstanding the fact that a dismissal of the government's appeal on grounds of non-appealability would be to plaintiff's advantage, he must nevertheless respectfully urge that candor compels the conclusion that this Court has jurisdiction to review the government's appeal.

Respectfully submitted,

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Dated: New York City
May 10, 1977

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